The uncontroverted salient facts in the instant case are set forth succinctly by the District Court below in its reasons for judgment, as follows:

> "In support of its motion, defendant filed the depositions of Mr. and Mrs. Alfred Sidney Elkins, the parents of Robert, and the deposition of Mrs. Mae Brooks, the widowed mother of Mark David, which reflect that the parents of the minor children were domiciled in the State of Louisiana long before, and have been continuously since, the birth of the minors in 1956. The Elkins and Brooks families are neighbors and the accident of February 4, 1968, occurred in the backyard of the Elkins home.
>
> "These depositions further reflect: the Elkins child presently resides with his parents in Kenner, Louisiana; has done so since his birth; and has been continuously under their care, custody and control; the Brooks child, whose father died in 1967, resided with both parents in Kenner, Louisiana; and has been residing there with his mother, under her sole care, custody and control, since his father's death.
>
> "There can be no doubt that the parents of the minors are domiciled in Louisiana, and the domicile of an unemancipated minor is that of his father, mother, or tutor."

Admittedly, the plaintiff in this case, who claims to be the foreign general guardian of the said minor children, *has not qualified as tutor or tutrix of the said resident minors according to the law of Louisiana.* Under the law of Louisiana, a foreign guardian may appear in court on behalf of a minor *only when:*

(1) Such plaintiff is the guardian of a *minor residing outside Louisiana;* and,

(2) No tutor has been appointed in Louisiana to represent the minor.

Article 4431 of the Louisiana Code of Civil Procedure provides, as follows:

> "Upon producing proof of his appointment, a tutor or guardian of a *minor residing outside Louisiana*, appointed by a court outside Louisiana, may appear in court on behalf of the minor without qualifying as tutor according to the law of Louisiana, *when no tutor has been appointed in this state.* He may perform acts affecting the minor's property in Louisiana, when authorized by the court of the parish in which the property is situated, in the same manner as a tutor appointed by a court in Louisiana.
>
> "When the action of an undertutor would be necessary, an undertutor ad hoc shall be appointed by the court." (Emphasis added)

Under the law of Louisiana, the domicile of an unemancipated minor is the same as his parents or tutor. Article 39 of the Louisiana Civil Code states, as follows:

> "A married woman has no other domicile than that of her husband; the domicile of a minor not emancipated is that of his father, mother, or tutor; a person of full age, under interdiction, has his domicile with his curator."

In the instant case, the domicile of the said minor children Robert Elkins and Mark Brooks is Jefferson Parish, Louisiana, wherein their parents reside. Thus,

under the above-quoted provisions of Article 4431 of the Louisiana Code of Civil Procedure, the plaintiff herein lacks the capacity and has no right to appear in court on behalf of the said minor children, *because the said minor children do not reside outside of Louisiana.* See *Succession of Vennard*, 11 So. 705 (1893).

Furthermore, under the terms of Article 4431, *supra*, the plaintiff herein, as a guardian appointed outside of Louisiana, lacks the capacity and has no right to appear in court in Louisiana on behalf of the said minor children, *because the said minor children have, by operation of law, duly designated and qualified representatives in Louisiana.*

Alfred S. Elkins, the father of Robert Elkins is the administrator of his said minor son's estate and occupies the position and has the powers of tutor over his said minor son. Article 683 of the Louisiana Code of Civil Procedure provides, in pertinent part, as follows:

* * *

> "The father, as administrator of the estate of his minor child, is the proper plaintiff to sue to enforce a right of an unemancipated minor who is the legitimate issue of living parents who are not divorced or judicially separated. . . ."

See Articles 221 and 4501 of the Louisiana Code of Civil Procedure; Article 4501 states, as follows:

> "When both parents are alive and not divorced or judicially separated, property belonging to a minor may be sold or mortgaged, a claim of a minor may be compromised, and any other step

> may be taken affecting his interest, in the same manner and by pursuing the same forms as in case of a minor represented by a tutor, *the father occupying the place of and having the powers of a tutor.*
>
> "Whenever the action of an undertutor would be necessary, an undertutor ad hoc shall be appointed by the court, who shall occupy the place of and have the powers of an undertutor." (Emphasis added)

Mae Brooks, the surviving parent and mother of Mark Brooks, is the tutrix of her said minor son. Article 250 of the Louisiana Civil Code provides, as follows:

> "*Upon the death of either parent, the tutorship of minor children belongs of right to the other.* Upon divorce or judicial separation from bed and board of parents, the tutorship of each minor child belongs of right to the parent under whose care he or she has been entrusted.
>
> "All those cases are called tutorship by nature." (Emphasis added)

The record shows that Mae Brooks has Letters of Tutorship for her said minor son from the 24th Judicial District Court, Jefferson Parish, Louisiana. Article 4031 of the Louisiana Code of Civil Procedure provides, in pertinent part, as follows:

> "A petition for the appointment of a tutor of a minor domiciled in the state shall be filed in the district court of the parish where the surviving parent is domiciled, if one parent is dead, or in the parish where the parent or other person awarded custody of the minor is domiciled, if the parents are divorced or judicially separated. . . ."

Accordingly, under the law of Louisiana, the plaintiff herein lacks the capacity and has no right to appear in court on behalf of the said minor children, and the real and proper parties to maintain this tort action on behalf of the said minor children are their parents, Alfred S. Elkins and Mae Brooks, who are both citizens of Louisiana.

It is pertinent to note that Alfred S. Elkins and Mae Brooks, in their representative capacities over their said minor children, filed suit on behalf of their said minor children for this same tort action in the State District Court for Orleans Parish, as will appear in the record from the copy of the state court suit entitled "Sydney Elkins, Individually and as the Administrator of the Estate of his Minor Child, Robert Neal Elkins; Mae Brooks, Individually and as the Tutrix for her Minor Child, Mark David Brooks vs. Louisiana Power & Light Company." The title to the state court suit of itself recognizes that the plaintiff herein is not, and under the law of Louisiana cannot properly be, a party plaintiff to appear in court on behalf of the said minor children on this tort action, cf. *Martineau v. City of St. Paul*, 172 F. 2d 777 at 780, fn. 8 (8th Cir. 1949).

Additionally, in the recent case of *McSparran v. Weist*, 402 F. 2d 867 (3rd Cir. 1968) (Cert. den. 37 L. W. 3443), the Court disapproved of and in effect overruled the case of *Fallat v. Gouran*, cited at pages 3 and 5 of the petitioner's brief, even though the plaintiff guardian in the *Fallat* case had capacity to sue. In the *McSparran* case, the Court held that "manufactured" diversity of citizenship by which a foreign guardian was selected to prosecute the suit of a resident minor did not constitute

an adequate foundation for diversity jurisdiction in federal district courts, citing 28 U.S.C.A. §1359, which states, as follows:

> "A district court shall not have jurisdiction of a civil action in which a party, by assignment, or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

Thus, even if the plaintiff in the instant case were capable of maintaining this suit, the opposing counsel's selection of the foreign guardian to create diversity jurisdiction flys in the face of the provisions of 28 U.S.C.A. §1359, as held in the *McSparran* case, because the real and proper parties to appear in court and maintain this action on behalf of the said minor children are their parents, Alfred S. Elkins and Mae Brooks, who are both citizens of Louisiana, of which the defendant, Louisiana Power & Light Company, is also a citizen.

The defendant, Louisiana Power & Light Company, as will appear in the record from the uncontroverted affidavit of E. A. Rodrigue, its Senior Vice-President, is chartered and incorporated in the State of Florida, but has its principal place of business in New Orleans, Orleans Parish, Louisiana, and, for the purposes of determining diversity jurisdiction in the District Court, this defendant is considered a citizen of the State of Louisiana, as well as the State of Florida.

In a civil action where the cause of action or controversy is based upon diversity of citizenship between the parties, it is clear, under the provisions of the Federal Judicial Procedure, 28 U.S.C.A., Section 1332, sub-section (c), that a corporation shall be deemed a citizen of any

state by which it has been incorporated, and of the state where it has its principal place of business.

CONCLUSION

Obviously, the dispute and controversy of this tort action is solely between citizens of Louisiana, when properly viewed in the light of the citizenship of the real parties in interest and proper party plaintiffs, the children's parents, who do have standing to sue on behalf of the said minors under the law of Louisiana.

The plaintiff herein, under the law of Louisiana, lacks the capacity and right to appear in court on behalf of the said minors, and is an interloper conceived in the mind of counsel for the claimants solely for the purpose of attempting to invoke the diversity jurisdiction of the Federal District Court.

It is respectfully submitted that opposing counsel's efforts are based upon an imperfect premise and should not be countenanced by this Court, because clearly the plaintiff selected by opposing counsel lacks the capacity or the standing to appear in court on behalf of the said minors, when the subject is viewed, as it must be under Federal Rule 17(b), in the light of the law of Louisiana.

Further, even if the plaintiff had the capacity to maintain this suit, there is no proper basis for diversity jurisdiction in view of 28 U.S.C.A. § 1359, and the recent holding in the *McSparran* case *supra*.

Accordingly, the defendant submits that the judgments of the District Court and the Court of Appeals below are

correct and that the plaintiff's petition herein should be dismissed at her costs.

Respectfully submitted,

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CERTIFICATE

I, the undersigned counsel, hereby certify that a copy of the above and foregoing brief has been served upon counsel for the plaintiff:

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New Orleans, Louisiana, this ____ day of March, 1970.

Andrew P. Carter